SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-1437

In the Supreme Court of the United States

October Term, 1975

Albert Roelofs, Jr., et al., Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF UNITED STATES IN BEHALF OF ALBERT ROELOFS, JR., ET AL., PETITIONERS

LEONARD L. LOCKARD
Booth, Lockard, Jack, Pleasant & LeSage
P. O. Drawer 1092
Shreveport, Louisiana 71163

OF COUNSEL:

JAMES J. THORTON, JR.
Johnston, Thornton & Pringle
P. O. Box 81
Shreveport, Louisiana 71161

JACK C. BENJAMIN
1718 First National Bank of Commerce
New Orleans, Louisiana 70112

KENNETH RIGBY
Love, Rigby, Dehan & Love
420 Johnson Building
Shreveport, Louisiana 71101

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The one point which is crystal clear in this case is what has been staunchly maintained by the Government and conceded by the various Courts below—the United States is not subject to the provisions of the Louisiana Workmen's Compensation Act and cannot be sued thereunder. Nevertheless, the United States seeks herein to claim the immunities granted by the Louisiana Workmen's Compensation Act, without exposing itself to the liability of making payments thereunder.

Petitioners have maintained throughout these proceedings that if a principal-contractor relationship exists, the principal is either an employer, suable in compensation or of necessity, suable in tort. Petitioners

adhere to this underlying principal that where no corresponding obligation or liability in compensation exists, there can be no immunity from suit in tort. As stated in Larson's Workmen's Compensation Law. Vol. 2, Section 72.31, Page 189:

> ". . . since the general contractor is thereby, in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable in compensation. . ." (Emphasis added).

It can thus be seen that the result advocated by the Government is incongruous.

The Brief in Opposition of the Government shows its misunderstanding of the Louisiana statutory scheme of Workmen's Compensation. The Government is correct in its assertion that Louisiana Law does not intend a "double payment of compensation", but no such payment is here sought by petitioners. What Louisiana Law does provide and what petitioners do seek is the right of the injured party to sue third persons in tort regardless of the payment of compensation. In such a case no double payment occurs because the compensation insurer may intervene in such action to recover, out of the judgment, what it has paid in compensation.[1]

The Government in opposition further contends that no additional exemption under the FTCA has been created by the Court of Appeals' decision. The Court of

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[1]The record will reflect that the compensation insurer has intervened in these proceedings seeking precisely that reimbursement should petitioners be successful in these suits.

Appeals reached the conclusion that the mere fact that a government contractor procures workmen's compensation insurance acts to insulate the Government from responsibility in tort under the FTCA. Petitioners urge that this cannot be by the grace of either the FTCA or the law of Louisiana, but by judicial fiat alone.Congress has specified fifteen exemptions in the FTCA. Two are contained in 28 U.S.C. Section 2679 and thirteen in 28 U.S.C. Section 2680. None of these exceptions remotely deal with compensation from a source traceable to the United States. Illustrative of this point is the case of United States v. Brown, 348 U.S. 110, where the claimant, although he received disability benefits under the Veterans Act for the same injury, was held not to be precluded from recovery under the FTCA. The benefits paid were directly traceable to the United States Treasury and not, as here, through a contract with a third person. Brown was specifically reaffirmed in the recent case of United States v. Munitz, 374 U.S. 150.

In the case at bar the War Department, by administrative decision, has elected to require its contractors to procure workmen's compensation insurance. Surely, the existence or non-existence of such insurance is irrelevant. Suppose instead the Government, through the same administrative agency, had elected to pay compensation to the civilian employees of its contractor directly out of the Treasury of the United States. Could it, by such a decision, determine whether the Government should be liable in tort or in compensation? It seems obvious to us that the answer is no. To hold otherwise would place it within the power of a mere agency of the United States to subject or exempt itself in its unfettered discretion from the effects of the FTCA.

In essence, then, the Court's decision below has created another exception to the fifteen exceptions provided for by Congress, that is, if compensation is paid to an injured employee under local law, the FTCA cannot apply. As was said by the United States Supreme Court in Rayonier v. United States, 352 U.S. 315, 320, 1 L. Ed. 2d 354, 77 S. Ct. 374 (1957):

> "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is the function for the same body that adopted it."

The Government's Brief in Opposition, by footnote at page 3, asserts that the decision of the Court of Appeals herein is not in conflict with the decisions of this Court in United States v. Brown, supra, and United States v. Muniz, supra. To the contrary, in those cases, this Court was faced with the same task of harmonizing the provisions of the FTCA with those of other compensation statutes and it was clearly held therein that where the United States may be liable under the FTCA and some other compensation statute, the FTCA should not be interpreted as requiring either a doctrine of exclusiveness or an election of remedies. Consequently, a claimant may proceed and recover under either or both statutes unless by Act of Congress, one or the other has been made his exlusive remedy. Here there is no Act of Congress making the Louisiana Workmen's Compensation Act the exclusive remedy of these petitioners as against the United States under the FTCA. Thus, in the absence of such Congressional expression as to exclusiveness there is conflict between the decision of the Court of Appeals and the aforementioned decisions of this Court.

The Government next contends that the decision below "merely recognizes that the act does not waive

sovereign immunity where, as here, the United States, if a private person, would not have been liable under local law." In attempting to reconcile and harmonize the various acts of Congress and acts of Louisiana, which comprise the Legislative web in which petitioners find themselves, a thorny problem is presented. The Government consistently argues, by analogy, and yet, no analogy is possible under the facts in this case. We start with the one proposition that under the FTCA the United States is liable in tort only where it would have been liable under local law if a private person. On the other hand, a private person under Louisiana Law would not be liable in tort where he occupies the status of statutory employer. But a private person under Louisiana Law would by virtue of statutory employer status be liable in compensation directly to the injured workman irrespective of the solvency, or the insured status of the sub-contractor. Here the Government cannot be made directly liable unto the workmen for compensation benefits because under 40 U.S.C. 293, Congress has immunized the United States Government from responsibility under State Workmen's Compensation Laws. How then, can the Government in asserting private person status assert that it is immune in tort and immune in Workmen's Compensation, where no such "private person" exists under Louisiana Law? Furthermore, the Louisiana Statutory Employer provision makes the principal employer liable in compensation directly to the injured workman. How can the Government seek to occupy that status when by Act of Congress it cannot be made liable in compensation? The Government simply cannot enjoy the immunites of that status without the corresponding obligations.

Lastly, the Government contends that the Court of Appeals noted Louisiana as being unique in its interpretation of the "statutory employer" for workmen's

compensation claims. In fact, the Court of Appeals decision in footnote six (Pet. App. 45) notes simply that:

> "... no case out of Louisiana has been cited showing that other jurisdictions read the third party immunity into their statutory employer provision."

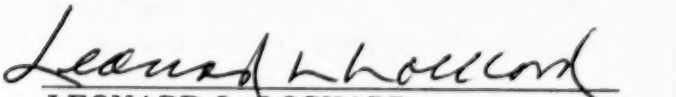
As stated in Larson's Workmen's Compensation Law, Vol. 2, Section 72.31, Page 189:

> "Forty-three states now have 'statutory employer' or 'contractor-under' statutes—i.e., statutes which provide that the general contractor shall be liable for compensation to the employee of a sub-contractor under him, usually when the sub-contractor is uninsured but sometimes without reference to the insured status of the sub-contractor, doing work which is part of the business, trade or occupation of the principal contractor. Since the general contractor is thereby, in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation; and the great majority of cases have so held."

Thus it may be seen that there is abundant need for uniform interpretation of "statutory-employer" provisions of State Workmen's Compensation Laws when the Government seeks the benefits of same. Such uniform interpretation can only be provided by this court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

BOOTH, LOCKARD, JACK, PLEASANT
& LESAGE



LEONARD L. LOCKARD
Counsel of Record

P. O. Drawer 1092
Shreveport, Louisiana 71163

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of July, 1975, I served the foregoing REPLY TO BRIEF IN OPPOSITION OF UNITED STATES IN BEHALF OF ALBERT ROELOFS, JR., ET AL., PETITIONERS, upon all opposing counsel, by causing copies to be properly mailed, postage prepaid.

BOOTH, LOCKARD, JACK, PLEASANT & LESAGE

L. L. LOCKARD